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SOL (MSHA) V. TRIPLE S COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	PETITIONER	Civil Penalty Proceeding Docket No. PIKE 79-22-P Assessment Control No. 15-09646-03001
v.		
TRIPLE S COAL COMPANY,	RESPONDENT	Mine No. 2

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Gary Stiltner, Ash Camp, Kentucky, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to written notice dated April 12, 1979, as amended May 7, 1979, a hearing in the above-entitled proceeding was held on May 17, 1979, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

MSHA's Petition for Assessment of Civil Penalty was filed on November 14, 1978, in Docket No. PIKE 79-22-P seeking assessment of a civil penalty for an alleged violation of 30 CFR 75.1711 by respondent.

Issues

The issues raised by the Petition for Assessment of Civil Penalty are whether a violation of 30 CFR 75.1711 occurred and, if so, what monetary penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act. My decision as to whether a violation occurred will be based on the findings of fact set forth below:

Findings of Fact

(1) The respondent in this proceeding is Triple S Coal Company which is a four-man partnership (Tr. 19). For a short period of time, respondent operated a No. 1 Mine near Feds Creek, Kentucky. Respondent subleased the mineral rights to the coal in its No. 1 Mine from Hawkins Coal Company.

(2) Another company, B D and D Coal Company, operated a mine about one-half mile from respondent's No. 1 Mine. B D and D Coal Company also subleased the mineral rights to the coal in its mine from Hawkins Coal Company. After BD&D had stopped producing coal in its mine, Hawkins Coal Company asked Mr. Gary Stiltner, one of the copartners in Triple S Coal Company, to inspect the mine which BD&D had abandoned to determine if any more coal could economically be produced from that mine (Tr. 20).

(3) After a coal mine is abandoned, no person may reenter that mine without filing with MSHA for permission to reopen the mine (Tr. 21). Therefore, in order for Mr. Stiltner to inspect the mine abandoned by BD&D, it was necessary for him to travel to Phelps, Kentucky, and execute certain forms which indicated that Triple S Coal Company wished to reopen, as its No. 2 Mine, the mine which BD&D had abandoned (Exh. 4; Tr. 20).

(4) In May 1977, Mr. Stiltner and two MSHA inspectors examined the No. 2 Mine to determine whether there was coal in the mine which could be produced economically (Tr. 22). The MSHA inspectors and Mr. Stiltner found that so much work would have to be done to the No. 2 Mine to make it operable, that the small amount of coal reserves remaining in the mine could not be economically produced (Tr. 20). After he had determined that the No. 2 Mine could not be operated economically, Mr. Stiltner returned to MSHA's office and filled out the necessary forms to show that Triple S Coal Company had abandoned the No. 2 Mine (Tr. 20). MSHA's Mine Information Form alleges that Triple S Coal Company had four men working at the No. 2 Mine, but not producing coal. Mr. Stiltner intended for the information furnished to MSHA to show how many men planned to work at the No. 2 Mine if the initial inspection of the mine had indicated that the No. 2 Mine could become a feasible operation (Tr. 21-22; Exh. 4).

(5) As it turned out, Triple S Coal Company never did produce any coal at the No. 2 Mine and none of the Triple S Coal Company's copartners, other than Mr. Stiltner, ever went to the No. 2 Mine, and Mr. Stiltner only entered the No. 2 Mine once while in the company of two MSHA inspectors (Tr. 22).

(6) Section 75.1711 provides that any coal mine which is permanently closed, or abandoned for more than 90 days, shall be sealed by the operator of the mine in a manner prescribed by the Secretary. The manner of sealing is set forth in section 75.1711-2 providing that the entries of abandoned or closed mines are to be sealed with materials such as concrete blocks or by filling the entries with incombustible material for a distance of 25 feet. Additionally, drain pipes at least 4 inches in diameter must be installed in at least one entry (Tr. 10).

(7) An MSHA inspector examined the site of respondent's No. 2 Mine on September 20, 1977, and found that the Nos. 1 and 3 entries had been properly sealed, but the Nos. 2 and 4 entries had not been properly sealed. Dirt had been pushed into the Nos. 2 and 4 entries for a distance of only about 5 or 10 feet and there was space above the dirt through which persons could enter

the mine (Tr. 6-7).

(8) After observing the conditions described in paragraph (7) above, the inspector issued Notice No. 1 ELF (7-2) on September 20, 1977, citing respondent for a violation of section 75.1711 (Tr. 6; Exh. 1).

On the basis of the findings set forth above, I conclude that a violation of section 75.1711 occurred. Mr. Stiltner was actually making an economic evaluation of the coal reserves remaining in the No. 2 Mine as an agent for Hawkins Coal Company (Tr. 21), but there is nothing on the Mine Information Form in MSHA's files to show that Mr. Stiltner was acting for Hawkins. The Mine Information Form shows only that Triple S Coal Company had applied for permission to reopen the mine which BD&D had been operating. The Form shows that Triple S Coal Company intended to operate the mine as its No. 2 Mine. Although Mr. Stiltner was acting as Hawkins' agent, he was also acting on behalf of the partnership which owned Triple S Coal Company because he stated that if producible coal reserves had been found, the four partners who comprised Triple S Coal Company would have jointly participated in operating the No. 2 Mine (Tr. 27-28; Exh. 3).

Having found that a violation occurred, it is now necessary to consider the six criteria before assessing a civil penalty.

Size of Respondent's Business

Respondent's No. 1 Mine produced only about 20 tons of coal daily over a short period of time (Tr. 26). Respondent never did operate the No. 2 Mine as an active mine (Tr. 18; 21). The four partners who operated the No. 1 Mine are now producing coal from a mine in Virginia under the name of G and R Coal Company. The reserves from the Virginia mine were obtained from Bostic Coal Company. The Virginia mine produces about 50 or 60 tons of coal per day. The coal was sold to Bostic Coal Company until My 14, 1979, when Bostic notified the partners that it no longer had any orders to fill and would not purchase any more coal from the four partners until further notice (Tr. 29-30).

On the basis of the facts set forth above, I find that respondent is a very small operator and that the penalty should be assessed in a low range of magnitude to the extent that it is determined under the criterion of the size of respondent's business.

Effect of Penalties on Ability of Respondent To Continue in Business

The facts reviewed above show that the four partners are now operating only a single coal mine. At the time of the hearing, they were stockpiling their coal because they had no market for it. Even when they have a market for their coal, they would be likely to have a marginal operation because they were producing only 50 to 60 tons per day. I find that some consideration should be given in assessing a penalty to the criterion of whether payment of penalties will cause respondent to discontinue in business.

History of Previous Violations

Counsel for MSHA stated at the commencement of the hearing that respondent does not have a history of previous violations at its No. 2 Mine (Tr. 3). Therefore, it is unnecessary to consider the criterion of history of previous violations in assessing a penalty.

Good Faith Effort To Achieve Rapid Compliance

Notice No. 1 ELF was written on September 20, 1977, and provided that respondent should have until October 21, 1977, within which to seal the entries on the No. 2 Mine (Exh. 1). On October 25, 1977, an inspector other than the one who had written Notice No. 1 ELF issued Order of Withdrawal No. 1 HB stating that entry No. 1 was not properly sealed and that no drain pipes had been provided for the Nos. 1, 2 and 3 openings within the time allowed. The conditions stated in the withdrawal order imply the existence of sealing requirements which are inconsistent with MSHA's actual requirements for the sealing of abandoned mines. The withdrawal order alleges that respondent had failed to place drain pipes in the Nos. 1, 2 and 3 entries, whereas MSHA's reqirements for installation of drain pipes state (Tr. 10-11):

> * * * A means to prevent a build-up of water behind the seal shall be provided in at least one of the seals. Metal pipes used for this purpose shall be a minimum of 4 inches in diameter and shall be installed of sufficient height above the bottom of the seal to prevent it from becoming blocked with mud or debris. [Emphasis supplied.]

The inspector who wrote Notice No. 1 ELF testified that no drains had been placed in the entries and that the Nos. 1 and 3 entries had been sealed, whereas the Nos. 2 and 4 entries had not been adequately sealed (Tr. 7). The order of withdrawal alleges that only the No. 1 entry had not been adequately sealed and that drains were needed in three of the four entries. The inference which could be drawn from the order of withdrawal is that some work had been done between the writing of the notice by one inspector and the issuance of the withdrawal order by a different inspector. Inasmuch as the inspector who wrote the notice had not been back to the mine after he issued the notice and since Mr. Stiltner had not returned to the mine after the notice was written, there were no witnesses at the hearing who could state whether any work had been done to improve the seals on the entries between the time the notice was issued and the time the withdrawal order was issued.

Respondent's defense in this proceeding has always been that since it owned neither the mineral rights nor the land on which the No. 2 Mine was situated, it was not obligated to seal the mine under the requirements of section 75.1711 (Tr. 23). Mr. Stiltner testified that the owner of the land on which respondent's No. 1 Mine was located did not want the entries sealed after respondent abandoned the No. 1 Mine, but Hawkins

Coal Company,

from whom he subleased the coal, had sealed the entries to the No. 1 Mine despite the land owner's objections. Mr. Stiltner stated that whatever work had been done in sealing the entries to the No. 2 Mine had also been done by someone hired by Hawkins Coal Company (Tr. 23).

The facts reviewed above show that Hawkins Coal Company may have attempted to do some additional work toward sealing the No. 2 Mine after the notice was issued, but there is no specific evidence in the record to support a finding that Hawkins or anyone else actually did any additional work toward sealing the mine after the notice was issued. The discrepancies between the conditions described in Notice No. 1 ELF and Order No. 1 HB may have resulted from two inspectors having come to slightly different conclusions after examining the same physical evidence.

In order to find that respondent made a good faith effort to achieve compliance, there should be some evidence showing that respondent took some kind of action to make certain that all the entries of the No. 2 Mine were sealed after Notice No. 1 ELF was issued, but the evidence shows that respondent did nothing. Although respondent knew that Hawkins Coal Company had undertaken to seal the entries before the notice was issued, respondent made no effort to get Hawkins to improve or complete the sealing work which had already been started. Mr. Stiltner knew that Hawkins had hired a third party to do the work that had been done before the notice was written (Tr. 23). It is inconceivable that Hawkins would have hired a third party to seal the entries in a fashion which would not pass MSHA's inspection. That third party was liable to Hawkins for doing a satisfactory job in sealing the entries. The least that respondent should have done would have been to have reported to Hawkins that the No. 2 Mine had not been properly sealed and that as a result of the poor workmanship done by the third party which Hawkins had hired to seal the entries, respondent had been cited for a violation of section 75.1711. Respondent could have then insisted that Hawkins have the third party complete the work which had been started, but not completed in a satisfactory manner.

Respondent's failure to do anything whatsoever after Notice No. 1 ELF was issued supports a finding, and I so find, that respondent failed to make a good faith effort to achieve compliance after Notice No. 1 ELF was issued. Therefore, respondent's indifference about seeing that the mine was properly sealed will be given considerable weight in assessing a penalty.

Negligence

As indicated above, respondent did not own the mineral rights to the coal and did not own the land on which the No. 2 Mine was situated. The land owner did not want the mine entries sealed after respondent had abandoned its No. 1 Mine, but Hawkins Coal Company, which owned the mineral rights, sealed the entries despite the contrary wishes of the land owner (Tr. 24-25). Respondent has been involved in several coal-mining operations and is knowledgeable about the obligations which an operator has

to

assume when he abandons a mine. Moreover, MSHA sends each operator who abandons a mine a letter advising him that he must do certain things. Among those things is the requirement that he seal the openings of the mine which he has abandoned (Tr. 9-10). Respondent did not deny that it had received that sort of information from MSHA.

Even if MSHA failed to send a letter to respondent advising him about the requirement that entries of abandoned mines are required to be sealed, the former Board of Mine Operations Appeals held in Freeman Coal Mining Co., 3 IBMA 434 (1974), that the operator is conclusively presumed to know what the mandatory health and safety standards are. Consequently, I find that respondent's failure to inquire about the sealing of the No. 2 Mine involved ordinary negligence even though respondent expected Hawkins Coal Company to do the actual sealing of the mine. Respondent's witness agreed at the hearing that abandonment of the No. 2 Mine involved the furnishing of a final map just as if respondent had actually produced coal from the No. 2 Mine (Tr. 23). Since respondent also knew that the entries had to be sealed (Tr. 23), he should have made an effort to seal the mine or determine for certain that Hawkins Coal Company intended to seal the entries as required by section 75.1711.

Gravity of the Violation

The inspector stated that the danger associated with failure to seal the mine was that the mine was located about one-half mile from the nearest residence and that a person might venture to the site of the mine and might enter it and be injured or killed either by rocks falling from the roof or by encountering air devoid of oxygen. The No. 2 Mine was a relatively shallow mine which extended only about 400 feet underground (Tr. 8-9), but that would be a sufficient distance for a person to be injured or killed if he should venture into the mine. The mine was located only 2 miles from a school house and it is easily possible that someone from the school might walk to the mine from the school and be injured (Tr. 5). Therefore, I find that the violation was serious.

Assessment of Penalty

There are many extenuating circumstances associated with assessing a penalty in this proceeding. The facts show that Mr. Stiltner was acting as an agent of Hawkins Coal Company. He apparently expected Hawkins Coal Company to seal the No. 2 Mine just as it sealed his No. 1 Mine. Hawkins Coal Company's failure to seal the mine adequately resulted in respondent's being cited for the violation of section 75.1711. As Mr. Stiltner conceded at the hearing, he made a mistake in not showing on the Mine Information Form that it was really Hawkins Coal Company which wanted the No. 2 Mine reopened in order to evaluate the economic feasibility of recovering coal from the mine (Tr. 21). If Hawkins Coal Company's name had appeared on the Mine Information Form, there is reason to assume that Notice No. 1 ELF would have been issued in the name of Hawkins Coal Company instead of Triple

S Coal Company.

It seems somewhat unfair to require respondent to pay a civil penalty for failure to perform an obligation which another company probably should have done, and did attempt to do in an inadequate fashion. There was no information in MSHA's files, however, which even hinted that Mr. Stiltner was really having the No. 2 Mine reopened at the request of Hawkins Coal Company. Therefore, MSHA properly held Triple S Coal Company liable for sealing the mine because it had no reason to believe that any other entity was liable.

Considering that respondent operates a very small business, that its operations would be adversely affected by a large penalty, that a good faith effort was not made to achieve compliance, that there is no history of previous violations, that ordinary negligence was involved, and that the violation was serious, a penalty of $150 will hereinafter be assessed for this violation of section 75.1711.

Ultimate Findings and Conclusions

(1) Respondent should be assessed a civil penalty of $150.00 for the violation of section 75.1711 cited in Notice No. 1 ELF (7-2) dated September 20, 1977.

(2) Respondent, as the operator of record of the No. 2 Mine, is subject to the Act and to the regulations promulgated thereunder.

WHEREFORE, it is ordered:

Respondent, within 30 days from the date of this decision, shall pay a civil penalty of $150.00 for the violation described in paragraph (1) above.

Richard C. Steffey
Administrative Law Judge